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Tan Joon Kiang v AM Finance Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–22–1403 OF 2003
HARMINDAR SINGH JC
29 SEPTEMBER 2009

C

Tort — Malicious prosecution — Conditions to be satisfied — Whether there was want of reasonable and probable cause and malice

D

Tort — Negligence — Duty of care — Action by bank against guarantor — Default judgment set aside as irregular judgment — Whether there was duty of care in negligence owed by a litigant to his adversary in the conduct of litigation proceedings

E

The defendant bank filed a claim against the plaintiff businessman for the sum of RM36,483.45 together with interest. According to the defendant, the claim arose from a hire purchase transaction for a vehicle under which the plaintiff had allegedly stood as guarantor. The summons against the defendant was served via substituted service and judgment in default of
F appearance was then obtained. The defendant then commenced bankruptcy proceedings and the plaintiff was adjudged a bankrupt. However, the plaintiff was unaware of this until he visited the immigration office to renew his passport. It was only then that he discovered that he could not renew his passport because he was adjudged a bankrupt. The plaintiff then went about
G setting aside the default judgment on several grounds including short service and failure to comply with the rules relating to substituted service. The plaintiff claimed that he never signed the guarantee and that the defendant ought to have enquired as to this fact before the action was filed. The default judgment was set aside by the court on the basis that it was an irregular
H judgment. Thereafter by consent the receiving and adjudication order against the plaintiff was set aside. The plaintiff then filed the instant suit against the defendant seeking damages for negligence and for malicious prosecution, wherein he particularised his damages as RM1m for loss of profits, RM1m for injury to reputation, damages for emotional distress, aggravated damages,
I interest and costs. The plaintiff submitted that the defendant negligently obtained judgment against the plaintiff and proceeded to execute that judgment by bankruptcy proceedings culminating in the plaintiff being declared a bankrupt. The plaintiff further submitted that the institution of bankruptcy on an irregular judgment showed malice and want of reasonable

and probable cause. In dealing with the issue as to whether there was negligent conduct in this case, a policy question arose as to whether a litigant owed a duty of care to his adversary in relation to the conduct of litigation proceedings. The second issue to be determined was whether the plaintiff was maliciously prosecuted by the defendant on the facts of this case.

Held, dismissing the plaintiff's claim with costs:

(1) There is no duty of care owed by one litigant to another as to the manner in which the litigation was conducted whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules of procedure that control the litigation and not in tort. Public interest is best served if honest litigants are not cowed by fear of damages from bringing honest claims for adjudication and administration of justice will be better promoted if such actions are not discouraged. As such, there was no duty of care in negligence owed by a litigant to his adversary in the conduct of litigation proceedings and thus the plaintiff's claim in negligence must fail (see paras 12–13 & 16).

(2) In an ordinary case of malicious prosecution it is necessary to show first that the proceedings terminated favourably in favour of the plaintiffs; secondly that there was absence of reasonable and probable cause for bringing them; and thirdly that there was malice or improper motive. In the instant case the proceedings terminated in favour of the plaintiff when the receiving and adjudication order was annulled but it could not be said that there was want of reasonable and probable cause for commencing an action against the plaintiff. Based on the guarantee which contained the signature and particulars of the plaintiff the defendant was entitled to file its claim without further enquiry. After having obtained the default judgment the defendant was also perfectly within its rights to resort to bankruptcy proceedings. Further, although there may have been an error in the service of the summons there was no improper motive or malice behind this to prove malicious prosecution. As such, the plaintiff's claim in this regard must also fail (see paras 19, 23 & 29–30).

[Bahasa Malaysia summary

Defendan memfailkan suatu tuntutan terhadap plaintif seorang ahli perniagaan untuk sejumlah RM36,483.45 bersama dengan faedah. Menurut defendan, tuntutan itu timbul daripada satu transaksi sewa beli untuk sebuah kenderaan di mana plaintif telah dikatakan bertindak sebagai penjamin. Saman terhadap defendan telah diserahkan melalui penyampaian ganti dan

penghakiman ingkar kehadiran telah kemudiannya diperolehi. Defendan telah memulakan prosiding kebankrapan dan plaintif telah dihukum bankrap. Walau bagaimanapun, plaintif tidak sedar mengenai perkara ini sehingga dia pergi ke pejabat imigresen untuk memperbaharui pasportnya. Hanya pada masa itu dia mendapati bahawa dia tidak dapat memperbaharui pasportnya kerana dia telah dihukum bankrap. Plaintif kemudiannya berusaha untuk mengetepikan penghakiman ingkar tersebut atas beberapa alasan termasuk penyampaian singkat dan kegagalan untuk mematuhi peraturan-peraturan berkaitan dengan penyampaian ganti. Plaintif mendakwa bahawa dia tidak pernah menandatangani jaminan dan bahawa defendan yang sepatutnya telah bertanya tentang fakta ini sebelum tindakan itu difailkan. Penghakiman ingkar tersebut telah diketepikan oleh mahkamah atas alasan bahawa ia adalah satu penghakiman luar aturan. Kemudiannya dengan izin perintah penerimaan dan penghukuman terhadap plaintif telah diketepikan. Plaintif kemudiannya memfailkan guaman ini terhadap defendan untuk menuntut ganti rugi untuk kecuaian dan untuk pendakwaan niat jahat, di mana dia telah memperincikan ganti ruginya sebagai RM1 juta bagi kehilangan keuntungan, RM1 juta untuk kecederaan terhadap reputasi, ganti rugi untuk gangguan emosi, ganti rugi tambahan, faedah dan kos. Plaintif menghujahkan bahawa defendan dengan cuai memperolehi penghakiman terhadap plaintif dan meneruskan untuk melaksanakan penghakiman itu melalui prosiding kebankrapan berkesudahan dengan plaintif diisytiharkan seorang bankrap. Plaintif selanjutnya menghujahkan bahawa permulaan kebankrapan atas penghakiman luar aturan menunjukkan niat jahat dan berkehendakan suatu sebab yang munasabah dan berkemungkinan. Dalam berurusan dengan isu sama ada terdapat tindakan kecuaian dalam kes ini, satu persoalan dasar timbul terhadap sama ada seorang litigan mempunyai satu kewajipan berjaga-jaga terhadap penentangnya berkaitan dengan pengendalian prosiding litigasi. Isu kedua yang perlu ditentukan adalah sama ada plaintif didakwa dengan niat jahat oleh defendan atas fakta-fakta bagi kes ini.

Diputuskan, membatalkan tuntutan plaintif dengan kos:

(1) Tiada kewajipan berjaga-jaga terhadap satu litigan kepada litigan yang lain berkenaan dengan cara di mana litigasi tersebut dikendalikan sama ada berhubung dengan penyampaian proses atau berhubung dengan lain-lain langkah dalam prosiding tersebut. Perlindungan terhadap kesalahan adalah terkandung dalam kaedah-kaedah bagi prosedur yang mengawal litigasi dan bukan dalam tort. Kepentingan awam adalah dilayani dengan cara terbaik jika litigan yang jujur tidak digertak dengan perasaan takut mengenai ganti rugi daripada membawa tuntutan-tuntutan jujur untuk diputuskan dan pentadbiran keadilan akan lebih baik dipromosikan jika tindakan-tindakan sedemikian

adalah digalakkan. Oleh itu, tidak ada kewajipan berjaga-jaga dalam kecuaian yang dihutang oleh seorang litigan kepada penentangnya dalam pengendalian prosiding litigasi dan oleh itu tuntutan plaintif dalam kecuaian mesti gagal (lihat perenggan 12–13 & 16).

(2) Dalam suatu kes pendakwaan niat jahat yang biasa ianya adalah perlu bagi menunjukkan pertamanya bahawa prosiding itu dibatalkan berpihak kepada plaintif-plaintif; keduanya bahawa ketiadaan sebab-sebab yang munasabah dan berkemungkinan untuk membawa mereka; dan ketiganya bahawa terdapat niat jahat atau motif tidak wajar. Dalam kes ini prosiding tersebut telah dibatalkan dengan memihak kepada plaintif apabila perintah penerimaan dan penghukuman telah dibatalkan tetapi ia tidak boleh dikatakan bahawa ianya terdapat suatu sebab yang munasabah dan berkemungkinan untuk memulakan satu tindakan terhadap plaintif. Berdasarkan kepada jaminan yang mengandungi tandatangan dan butir-butir plaintif defendan berhak untuk memfail tuntutannya tanpa pertanyaan lanjut. Setelah memperolehi penghakiman ingkar defendan adalah juga dengan sempurnanya berhak untuk menggunakan prosiding kebankrapan. Selanjutnya, walaupun mungkin telah berlaku satu kesilapan dalam penyerahan saman tetapi tiada motif tidak wajar atau niat jahat di sebaliknya bagi membuktikan pendakwaan niat jahat. Oleh itu, tuntutan plaintif juga mesti gagal (lihat perenggan 19, 23 & 29–30).]

Notes

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

For cases on malicious prosecution in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 688–705.

Cases referred to

Business Computers International Ltd v Registrar of Companies [1987] 3 All ER 465, Ch D (folld)

Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)

Donoghue v Stevenson [1932] AC 562, HL (refd)

Dorset Yacht Co Ltd v Home Office [1970] AC 1004, HL (refd)

Gibbs v Rea [1998] AC 786, PC (refd)

Glinski v McIver [1962] AC 726, HL (refd)

Herniman v Smith [1938] AC 305, HL (refd)

Hicks v Faulkner (1878) 8 QBD 167, HL (refd)

Isaacs v Robertson [1984] 3 All ER 140, PC (refd)

Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1984] 3 All ER 529, HL (refd)

A *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100; [1991] 1 CLJ (Rep) 343, SC (folld)
Quartz Hill Consolidated Gold Mining Company v Eyre (1883) 11 QBD 674, CA (refd)
Radivojeric v LR Industries Ltd [1984] Transcript No 1514, CA (refd)
B *Rawther v Abdul Kareem* [1966] 2 MLJ 201, FC (refd)
Rondel v Worsley [1967] 3 All ER 993, HL (refd)
Tempest v Snowden [1952] 1 KB 130, SC (refd)
Vijendran Ponniah v MBf Country Homes & Resort Sdn Bhd & Anor [2002] 1 MLJ 535; [2002] 2 CLJ 157, HC (refd)
C *Williams v Taylor* (1829) 6 Bing 183; 130 ER 125 (refd)

Pramjit Kaur (Mann & Associates) for the plaintiff.
KY Wong (Darshan Chong & Co) for the defendant.

D **Harmindar Singh JC:**

[1] The plaintiff is a businessman. The defendants are bankers. On 7 August 1994, the defendant filed a claim against the plaintiff in the Kota Bharu Sessions Court for the sum of RM36,483.45 together with interest. It
E was claimed that the plaintiff had stood as guarantor for one Zamri bin Ismail on a hire-purchase transaction for vehicle Isuzu Commando bearing registration No TN 6912. The guarantee agreement was dated 10 September 1994.

F **[2]** On 20 May 1995, the defendants obtained judgment in default of appearance. Bankruptcy proceedings were commenced and the plaintiff was adjudged a bankrupt in 25 June 1998. There is nothing unusual about this except that the plaintiff was unaware of these events.

G **[3]** Sometime in 1999, the plaintiff went to the immigration office to renew his passport. He was then told that he could not do so as he had been adjudged a bankrupt. He then engaged solicitors.

H **[4]** On 25 January 2001, the default judgment was set aside on the basis that it was an irregular judgment. Soon after, by consent, the receiving and adjudication order against the plaintiff was set aside. Eventually, on 23 June 2002, the defendants withdrew their claim against the plaintiff.

I **[5]** The plaintiff was naturally upset with the whole turn of events as his reputation was tarnished. He claimed that he never signed any guarantee and that he was never served with any documents regarding the claim against him. He has now filed this claim seeking damages for negligence and for malicious prosecution. He has particularised his damages as RM1,000,000 for loss of

profits, RM1,000,000 for injury to reputation, damages for emotional distress, aggravated damages, interest and costs.

NEGLIGENCE

[6] The plaintiff contends that the defendants had negligently obtained judgment against the plaintiff and proceeded to execute the said judgment by bankruptcy proceedings culminating in the plaintiff being declared a bankrupt. The particulars of negligence were pleaded as follows in the amended statement of claim:

Butir-Butir

(a) gagal memastikan bahawa penghakiman ingkar tidak dapat diperolehi;

(b) gagal memastikan samada penghakiman ingkar dapat diperolehi;

(c) dengan membenarkan penghakiman ingkar diperolehi;

(d) gagal memastikan tidak ada tuntutan terhadap plaintif;

(e) gagal memastikan samada ada satu tuntutan terhadap plaintif;

(f) gagal memastikan samada perintah penerimaan dan penghukuman tersebut tidak dapt diperolehi;

(g) gagal memastikan bahawa tidak dapat diperolehi perintah penerimaan dan penghukuman; dan

(h) dengan membenarkan diperolehi perintah penerimaan dan penghukuman.

[7] Before considering whether there was negligent conduct in this case, a policy question arises which must be determined at the outset. The question is this. Does a litigant owe a duty of care to his adversary in relation to the conduct of litigation proceedings? It may seem tempting to conclude that based on Lord Atkin's celebrated enunciation of the principles of negligence in *Donoghue v Stevenson* [1932] AC 562, a duty of care was incumbent on the defendant as the plaintiff has no doubt suffered damage as a direct result of the defendant's actions. This would be in keeping with the notion of justice that there must be a remedy for every wrongdoing, harm or loss suffered.

[8] This Atkin test has undoubtedly withstood serious scrutiny over the years. In fact, the House of Lords in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 provided ringing endorsement of the Atkin test where Lord Reid observed (at p 1027):

A the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.

B

[9] Whether a duty of care exists or not in a given set of circumstances has been the subject of much discussion in a series of decisions in the Privy Council and the House of Lords. Of particular significance is the House of Lords decision in *Caparo Industries plc v Dickman* [1990] 2 AC 605 where C Lord Bridge approved of the approach as follows (at p 617):

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the D situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

E **[10]** Coming back to the issue at hand, the factual matrix of the instant case bears some resemblance to the case of *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465. In that case, a petition to wind up the plaintiff company was served at the wrong address so that the plaintiff company was unaware of it. A winding up order was made against F the plaintiff company. When the plaintiff company discovered this, they applied to have it set aside. They also claimed damages against the defendants for negligence. The plaintiff claimed that it was owed a duty of care by the petitioner to take reasonable care to ensure that the registered office of the plaintiff was correctly stated in the petition, that the matters in the petition G were properly verified and that the petition was properly served at the plaintiff's registered office.

[11] This case, it should be noted, was decided before the decision in *Caparo Industries plc v Dickman*. However, Scott J relied on the House of H Lords decision of *Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 where it was held that in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into consideration whether it is just and reasonable that it should be so. The following is how Scott J appraised the issue of duty of care (at p 472):

I

> Is it just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the origination process? I do not think that it is. The plaintiff and the defendant, the petitioner and the respondent, are antagonist. The plaintiff, or the petitioner, is seeking a legal remedy in an adversarial system. The system stipulated the rules and requirements that must be observed by the two parties.

The plaintiff must issue his process and must serve it on the defendant. If there is default in service the process may be struck out. If an order is obtained without the prescribed rules or regulations having been observed, the order may be discharged or set aside, sometimes by an application at first instance, sometimes on appeal. The prosecution of the action or of the petition is subject throughout its career from institution to final judgment to judicial control. Service of process is a step, and usually an essential step, in the prosecution. It must usually be proved before an order can be obtained against an absent defendant. The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd. The safeguards against ineffective service of process ought to be, and I think must be, found in the rules and procedures that govern litigation. The rules and procedures require that, save on ex parte applications, proof of service be shown before an order is made against an absent party. If the proof of service is false, be it through negligence or design, an order may be made that should not have been made. The injured party's remedy is to have the order set aside. An action for damages cannot be based on the falsity of the proof of service. Nor, in my judgment, can the adequacy of the efforts made to effect service be subjected to a tortious duty of care.

[12] And then came to the following conclusion (at p 473):

I take this passage from Sir John Donaldson MR's judgment as supporting the view that I have endeavoured to express, namely that control of litigation and of the various steps taken in prosecuting litigation lies in the court and the rules and procedures that govern litigation and cannot be sought via a tortious duty of care imposed on one party for the benefit of the other.

This view is not, in my opinion, undermined but is reinforced by the facts of the present case. Counsel for the plaintiff has submitted forcefully that the plaintiff has been indemnified, through no fault of its own, and that, on the plaintiff's pleaded case, the damage would not have happened had the second defendant exercised proper care in ascertaining the correct address of the plaintiff's registered office. All this I am prepared to accept. But the damage of which the plaintiff complains was caused by the legal process instituted by the second defendant and by the winding up order made by the court. Damage of this character is not, in my judgment, apt to be remediable in an action based on tortious negligence.

In my judgment, there is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that control the litigation and not in tort.

I am therefore of opinion that the plaintiff's statement of claim does not disclose a reasonable cause of action against the second defendant and ought to be struck out.

A **[13]** For myself, I do not see any reason why this approach should not be adopted. I agree that public interest is best served if honest litigants are not cowed by the fear of damages from bringing honest claims for adjudication. The administrative of justice will be better promoted if such actions are not discouraged.

B

[14] In *Rondel v Worsley* [1967] 3 All ER 993, Lord Pearce said (at p 1204):

> The legal process inevitably created hardships and it is not always easy to see what is the right balance. In attempting to do so one must regard the interrelation of the
C various parts. It is a hardship that a man who had done no wrong should be subjected by a plaintiff to a baseless charge, in meeting which he will incur large expense. The charge may be reported largely in the newspapers and injure his reputation ... But the basic hardship is inevitable and will always remain, namely, that any plaintiff can use the legal machine as a sounding board for untruthful allegations and cause harm, trouble and expense to an innocent defendant, and yet
D the law holds him (and the press who report the case) immune from paying damages for their untruth. Yet to remove this immunity would create a great injury to justice. Without it, the honest litigant might not dare to bring an honest claim for fear that if he fails he might be sued for damages.

E

[15] Admittedly, there is a fine line between the hardship caused to defendants in meeting and defending baseless claims and the public interest of not discouraging honest claims. However, this balance is sufficiently addressed by having malice as an essential ingredient before one can be held
F to account for errors in litigation proceedings. In this way, although there may not be a remedy in negligence, there may still be available a remedy in a claim for malicious proceedings in bankruptcy and liquidation, malicious abuse of civil process or vexations abuse of process.

G **[16]** Accordingly, I accept that no duty of care in negligence is owed by a litigant to his adversary in the conduct of litigation proceedings. The plaintiff's claim in this regard must therefore fail.

MALICIOUS PROSECUTION

H

[17] An alternative claim of malicious prosecution was also pleaded in para 9 of the amended statement of claim as follows:

> 9. Defendan menegaskan defendan dengan niat jahat (maliciously) telah
I memperolehi penghakiman ingkar dan/atau perintah penerimaan dan penghukuman tersebut untuk memalukan plaintif dan/atau mengaibkan plaintif dan/atau rosakkan nama plaintif.

[18] There was no doubt that an action can arise for malicious proceedings in bankruptcy. In *Quartz Hill Consolidated Gold Mining Company v Eyre* (1883) 11 QBD 674 (CA), Brett MR said (at p 684):

> … It seems to me that an action can be maintained for maliciously procuring an adjudication under the Bankruptcy Act 1869, because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can show that the accusation made against him is false; he is injured in his fair name, even although he does not suffer a pecuniary loss. That seems to be the ground upon which Cleasby, B, supported the action in *Johnson v Emerson* (Law Rep 6 Ex 329, at p 310), and I think that his view was right. By proceedings in bankruptcy a man's fair name is injured just as much since the Bankruptcy Act 1869, as it was before, because he is openly charged with insolvency before he can defend himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial.

[19] As in an ordinary case of malicious prosecution, it is necessary to show, first, that the proceedings terminated favourably in favour of the plaintiffs; secondly that there was absence of reasonable and probable cause for bringing them; and thirdly, that there was malice or improper motive (per May LJ in *Radivojeric v LR Industries Ltd* [1984] Transcript No 1514 (CA) as cited in *Business Computers Ltd v Registrar of Companies*, at p 469).

[20] What is reasonable and probable cause? The definition by Hawkins J in *Hicks v Faulkner* (1878) 8 QBD 167 at p 171 was approved by the House of Lords in *Herniman v Smith* [1938] AC 305 and our Federal Court in *Rawther v Abdul Kareem* [1966] 2 MLJ 201 and reads as follows:

> I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

[21] What is malice? 'Malice in this context has the special meaning common to other torts and covers not only spite or ill-will but also improper motive' (*Gibbs v Rea* [1998] AC 786 at p 797 (PC). What will constitute want of reasonable and probable cause and malice will depend on the facts and circumstances of each case. In *Williams v Taylor* (1829) 6 Bing 183; 130 ER 125, Tindal CJ observed:

> What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a

A reasonable was that the accuser had no ground for proceeding but his desire to injure the accused. (Cited with approval in *Robin v Sunrise Investments (Pte) Ltd* [1991] 2 MLJ 517).

B **[22]** It should be noted also that if reasonable and probable cause is established, then malice becomes irrelevant (*Tempest v Snowden* [1952] 1 KB 130). And absence of reasonable cause cannot be inferred from malice (*Glinski v McIver* [1962] AC 726).

C **[23]** In the instant case, there was no doubt that the proceedings terminated in favour of the plaintiff. The receiving and adjudication order was annulled. In fact, the defendants withdrew the summons against the plaintiff.

D **[24]** But the pivotal question is whether there was want of reasonable and probable cause and malice. The whole action against the plaintiff was on the guarantee that he was alleged to have signed. The plaintiff claimed that he never signed the guarantee and it was contended on his behalf that the defendants should have enquired as to this fact before the action was filed.

E

[25] It was further contended that bankruptcy proceedings were instituted based on an irregular judgment and that the defendants did not enquire as to whether the judgment was served or not before proceeding to institute bankruptcy proceedings. What I can gather from the submission of learned F counsel for the plaintiff is that the institution of bankruptcy proceedings on an irregular judgment showed malice and want of reasonable and probable cause.

[26] The evidence disclosed that there was a guarantee allegedly signed by G the plaintiff which the plaintiff denied but which contained particulars of the plaintiff which particulars were admitted to be correct. The summons was served via substituted service. Default judgment was then obtained. The application to set aside was supported by several grounds including short service and failure to comply with the rules relating to substituted service. H What is noteworthy however is that the summons was in the end advertised in the newspapers. Although it was conceded that the judgment was irregularly obtained, it remained unclear as to why exactly it was irregular.

[27] In this regard, the plaintiff relied extensively and almost entirely on the I case of *Vijendran Ponniah v MBf Country Homes & Resort Sdn Bhd & Anor* [2002] 1 MLJ 353; [2002] 2 CLJ 157. In that case there was also a claim for damages due to civil malicious prosecution arising out of bankruptcy proceedings instituted against him by the defendants who had earlier obtained judgment in default of appearance. However, in that case, there was

a finding of fact that there was a concealment of material facts within the knowledge of the defendants. I do not think, with respect, that decision established any firm principle of law but was decided on the peculiar facts that existed in that case.

[28] On the question of the effect of an irregular judgment, I would with respect, prefer to rely on Supreme Court decision in *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100; [1991] 1 CLJ (Rep) 343, where it was held that a default judgment until set aside is a good and enforceable judgment. Speaking for the court, Hashim Yeop Sani CJ (Malaya) approved as correct the law stated in *Isaacs v Robertson* [1984] 3 All ER 140 where the headnote reads:

> Orders made by a court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinctions between orders that are 'void', in the sense that they can be ignore with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set them aside.

[29] In the instant case, in the face of a guarantee which contained the signature and particulars of the plaintiff, the defendants were perfectly entitled to file their claim without further enquiry. The claim was eventually withdrawn because as explained by SD1, an officer of the defendant bank, the witness to the guarantee could not be located. There may have been an error in the service of the summons but I was not apprised of any sinister or improper motive for it. It was an error which was not uncommon.

[30] After having obtained the default judgment, the defendants were also perfectly within their rights to resort to bankruptcy proceedings. This I believe is a fairly usual occurrence. It seems to me that what the plaintiff is seeking to do in this case is to somehow equate what appears at most to be mere negligence with something more sinister. But this cannot be right. As I had indicated earlier, compared to negligence, malicious prosecution requires greater culpability in the form of want of reasonable or probable cause and malice. In the instant case, the only evidence adduced was an error in the service of the summons and nothing more. In my view, this is a long way off from proving malicious prosecution. For these reasons, the claim in this regard must also fail.

[31] In the circumstances, the plaintiff's claim is dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan